

Randolph Yap Pow Kong & Anor v Yvonne Yap Yoke Sum (f) & Ors A

HIGH COURT (KUCHING) — SUIT NO S-22-15 OF 2007—III B
RAVINTHRAN JC
30 MARCH 2010

*Succession — Probate — Testamentary capacity — Allegation that testator had no C
testamentary capacity — Relevant point of time to determine testamentary capacity
— Whether ailing memory and weak mental power vitiate testamentary capacity
— Testator diagnosed with Parkinson disease and mild dementia — Whether D
testator was of sound disposing mind when he executed the will — Whether undue
influence, coercion or force exerted over testator*

*Succession — Will — Execution — Allegation that testator had no testamentary E
capacity — Relevant point of time to determine testamentary capacity — Whether
ailing memory and weak mental power vitiate testamentary capacity — Testator
diagnosed with Parkinson disease and mild dementia — Whether testator was of
sound disposing mind when he executed the will — Whether undue influence, F
coercion or force exerted over testator*

*Succession — Will — Execution — Validity of — Will thumbprinted — Whether G
thumbprint of testator was rolled over by coercion or force — Whether testator was
of sound disposing mind when he executed the will*

This was a suit to invalidate a will and a power of attorney purportedly executed by Mr YY Lee ('the deceased') on 18 January 2005. The plaintiffs were the two sons of the deceased from his first marriage. The first, second and fourth defendants were his children from his second marriage with the third defendant. The plaintiffs did not receive any bequests under the said will of the deceased. The sole beneficiary of the will was his widow, the third defendant. As for the power of attorney, the donees were the first and second defendant. They transferred two properties to themselves upon the purported instructions of the deceased. The deceased fell ill in 2003 and was hospitalised. That was the time he was diagnosed with Parkinson disease and mild dementia. He was also reported by the attending neurologist to have suffered hallucination and delusion as a result of adverse reaction to medication in 2004. He recovered when another drug to counter the side effect was given. He died in July of 2006, presumably from the progression of his illness. The plaintiffs' case was that the deceased lacked testamentary capacity, that he was subjected to the H
I

- A influence of the defendants and that the will was a forgery. Counsel for the plaintiffs also submitted the deceased was wheel-chair bound and depended completely upon the second defendant for his everyday needs. The argument was that the second defendant exerted undue influence on the deceased.
- B **Held**, dismissing the suit with costs:
- C (1) The relevant point of time to determine testamentary capacity is the time when the testator signs the will. He may have been lacking such capacity prior to the signing of the will or after signing the will but that is irrelevant for purpose of determining the validity of the will. Hence, the point of time that was crucial to the determination of the issue whether the deceased possessed a sound disposing mind was 18 January 2005, ie the date the will and power of attorney were signed (see para 11).
- D (2) Ailing memory and weak mental power cannot vitiate testamentary capacity (see para 14).
- E (3) The will in question was professionally drafted by an advocate, one Miss Colina Chang who had called a doctor to be present. Miss Chang personally called on the deceased to receive instructions. She prepared a draft will the following day and it was returned with some spelling corrections. The medical doctor who was present, Dr Tok had examined the deceased's vital signs and held a brief conversation with him. Dr Tok was satisfied that the deceased was mentally alert. These two witnesses were professionals who had no interest in the outcome of the litigation.
- F Their impartiality was not challenged. The defendants had discharged the burden of proving that the deceased was of sound disposing mind when he executed the will in question (see paras 5, 14–15 & 20).
- G (4) The facts showed that the plaintiffs were not as close to the deceased as they wanted the court to believe. Therefore, there was nothing irrational or improbable about the impugned will that cut them out of any inheritance (see para 20).
- H (5) There was no evidence at all to suggest that the thumbprint of the deceased was rolled over the will and the power of attorney by coercion or force. There was also no evidence that the second defendant had exerted undue influence over the deceased although he lived in the same house at the material time (see para 22).

[Bahasa Malaysia summary]

- I Ini adalah tindakan untuk mentaksahkan wasiat dan surat kuasa wakil dilaksanakan oleh En YY Lee ('si mati') pada 18 Januari 2005. Plaintiff-plaintif adalah dua anak lelaki si mati daripada perkahwinan pertamanya. Defendan-defendan pertama, kedua dan keempat adalah anak-anak si mati daripada perkahwinan keduanya dengan defendan ketiga. Plaintiff-plaintif

tidak menerima apa-apa pewasiatan di bawah wasiat si mati tersebut. Satu-satunya benefisiari wasiat adalah balunya, defendan ketiga. Untuk surat kuasa wakil, penerima kuasa wakil adalah defendan pertama dan kedua. Mereka memindahkan dua hartanah kepada mereka sendiri kononnya atas arahan si mati. Si mati jatuh sakit pada tahun 2003 dan dimasukkan ke hospital. Pada masa tersebut dia didiagnosis dengan penyakit Parkinson dan demensia ringan. Dia juga dilaporkan oleh pakar neurologi yang merawatnya bahawa dia mengalami halusinasi dan delusi akibat reaksi bertentangan kepada rawatan perubatan pada tahun 2004. Dia sembuh apabila ubat lain untuk melawan kesan sampingan diberikan. Dia meninggal dunia pada Julai 2006, mungkin daripada kemaraan penyakitnya. Kes plaintif-plaintif adalah bahawa si mati tidak mempunyai keupayaan pewasiatan, bahawa dia tertakluk di bawah pengaruh defendan-defendan dan bahawa wasiat tersebut adalah pemalsuan. Peguam plaintif-plaintif juga berhujah si mati bergantung kepada kerusi roda dan bergantung sepenuhnya kepada defendan kedua untuk keperluan hariannya. Pertikaian adalah bahawa defendan kedua menggunakan pengaruh tak wajar ke atas si mati.

A

B

C

D

Diputuskan, menolak tindakan dengan kos:

- (1) Masa yang relevan untuk menentukan keupayaan pewasiatan adalah masa apabila pewasiat menandatangani wasiat tersebut. Dia mungkin tidak mempunyai keupayaan tersebut sebelum menandatangani wasiat tersebut atau selepas menandatangani wasiat tersebut tetapi tidak relevan bagi tujuan menentukan kesahan wasiat tersebut. Maka, poin masa yang genting untuk menentukan isu sama ada si mati memiliki minda yang waras adalah pada 18 Januari 2005, iaitu tarikh wasiat dan surat kuasa wakil ditandatangani (lihat perenggan 11).
- (2) Daya ingatan yang lemah dan kuasa minda yang lemah tidak dapat menjadikan keupayaan pewasiatan tak sah (lihat perenggan 14).
- (3) Wasiat yang dipersoalkan didraf secara profesional oleh peguam, seorang yang bernama Cik Colina Chang yang memanggil doktor untuk hadir. Cik Chang secara peribadi berjumpa dengan si mati untuk menerima arahan-arahan. Dia menyediakan wasiat yang didraf pada keesokan harinya dan ia dikembalikan dengan pembetulan ejaan. Doktor perubatan yang hadir, Dr Tok telah memeriksa tanda-tanda penting si mati dan bercakap sekejap dengannya. Dr Tok puas hati bahawa si mati mindanya adalah peka. Kedua-dua saksi ini adalah profesional yang tidak mempunyai kepentingan di dalam hasil litigasi tersebut. Sifat adil mereka tidak dicabar. Defendan-defendan telah melepaskan beban pembuktian bahawa si mati adalah waras apabila dia melaksanakan wasiat yang dipersoalkan (lihat perenggan 5, 14–15 & 20).
- (4) Fakta menunjukkan bahawa plaintif-plaintif tidak rapat dengan si mati seperti yang mereka kehendaki mahkamah untuk mempercayainya.

E

F

G

H

I

A Oleh itu, tidak terdapat apa-apa yang tidak rasional atau sukar diterima akal mengenai wasiat yang memotong mereka daripada menerima apa-apa pewarisan (lihat perenggan 20).

B (5) Tidak terdapat keterangan langsung untuk mencadangkan bahawa cap ibu jari si mati diletakkan atas wasiat dan surat kuasa wakil oleh pemaksaan atau secara paksa. Juga tidak terdapat keterangan bahawa defendan kedua telah menggunakan pengaruh tak wajar ke atas si mati walaupun dia tinggal di dalam rumah yang sama pada masa material (lihat perenggan 22).]

C **Notes**

For cases on execution, see 11 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 2529–2534.

D For cases on testamentary capacity, see 11 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 2422–2432.

Cases referred to

Banks v Goodfellow (1870) LR 5 QB 549, QBD (refd)

E *Dr Shanmuganathan v Periasamy slo Sithambaram Pillai* [1997] 3 MLJ 61, FC (refd)

Gan Yook Chin (p) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)

Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97; [2003] 2 CLJ 19, CA (refd)

F *Tho Yow Pew & Anor v Chua Kooi Hean* [2002] 4 MLJ 97, CA (refd)

Udham Singh v Indar Kaur [1971] 2 MLJ 263, FC (refd)

Richard Poh (Poh & Co Advocates) for the plaintiffs.

Yong Sie Mee (Loke King, Koh & Co Advocates) for the first and second defendants.

G **Ravinthran JC:**

INTRODUCTION

H [1] This is a suit to invalidate a will and a power of attorney purportedly executed by Mr YY Lee ('the deceased') on 18 January 2005. Mr YY Lee died in July of the following year. The plaintiffs are the two sons of the deceased from his first marriage. The first, second and fourth defendants are his children from his second marriage with the third defendant. Needless to say, the plaintiffs did not receive any bequests under the said will of the deceased. The sole beneficiary of the will was his widow, the third defendant. As for the power of attorney, the donees were the first and second defendants. They transferred two properties to themselves upon the purported instructions of the deceased. The plaintiffs' case is that the deceased lacked testamentary capacity, that he was

subjected to the influence of the defendants and that the will is a forgery. The burden to prove testamentary capacity and to prove due execution of a will is on the propounder of the will which in this case are the defendants. On the other hand, the burden to prove any extraneous vitiating circumstances such as undue influence or forgery is on the person challenging a will. For this reason, the parties agreed at the outset that the normal order of adducing evidence should be reversed in that the defendant would open the case. I agreed to the suggestion based on the authority cited (see *Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai* [1997] 3 MLJ 61). The defendants called a total of nine witnesses which included two doctors and the solicitor who prepared the testamentary documents. The plaintiffs were the only witnesses on their own behalf. Before proceeding to discuss the issues in this case, I shall first summarise the evidence of the respective parties.

SUMMARY OF THE DEFENDANT'S EVIDENCE

[2] The deceased was apparently a very successful businessman in Kuching. He started out as an insurance man and later ran his own insurance agency as the District Manager of AIA. The second plaintiff even claimed that his annual income was RM750,000. The defendants challenged this assertion on the ground that there was no documentary evidence such as income tax returns. Regardless of the quantum of his annual earnings at the peak of his career which is not an issue in this case, what is not in dispute is that the deceased was a wealthy man by the time he died at the age of 82. He owned numerous landed properties in Sarawak which are the subject matter of the will and the power of attorney. These properties included 'Rock Villa' (Lot 48 Section 35 Kuching Town Land District) at Ricketts estate which was the residence of the deceased and his second wife, the third defendant.

THE DEFENDANTS — THE KUCHING FAMILY

[3] The third defendant is the second wife of the deceased. The deceased raised a family with her in Kuching. The first, second and fourth defendants are the children of the deceased and the third defendant. The first defendant is the eldest daughter. She lived in Rock Villa with her parents until she got married and moved to Kuala Lumpur in 1995. Therefore, she did not live in Rock Villa at the time of signing of the will. However, when the deceased was hospitalised in 2003, she came back to Kuching to visit him. She did not visit him frequently between 2003 and 2006 because she was busy with her child in Kuala Lumpur. The second defendant is the eldest son. At the material time he lived in Rock Villa with his parents. He told the court that the deceased had asked him in January of 2005 to call a lawyer to prepare his will. The fourth defendant is the younger daughter. She did not live in Rock Villa at the material time. She moved out after getting married in 1984. However, she met the

- A deceased frequently as they worked in the same insurance company. She was not the deceased's employee as she was an insurance agent in the company but later she managed to run her own agency. Sometime after the deceased fell ill in 2003, the deceased executed documents to transfer his agency to her. At that time, Dr Soo, her father's neurologist, certified that he was mentally sound.
- B However, this transaction is not the subject matter of dispute. She only moved into Rock Villa to help to take care of her parents in the later part of 2005. Her mother was suffering from fourth stage kidney failure and her brother, the second defendant suffered from a serious undisclosed illness as well. The fourth defendant was the daughter who always accompanied her father to hospital. In
- C fact she accompanied him to hospital in 2003 when he was first diagnosed with Parkinson disease and mild dementia. The deceased and the third defendant have three other children as well but they were not joined as defendants in this suit. They are Romano Yap, Ricardo Yap and Eva Yap.

D THE ATTESTING ADVOCATES

- [4] The second defendant called Miss Colina Chang who is an advocate to see the deceased to take instructions to prepare a will. Miss Chang testified that
- E she took instructions and returned the following day with a draft will. The draft will was returned by the second defendant with some spelling corrections in respect of the name of some of his grandchildren. She did not know who made the amendments. She also called a doctor to examine the deceased before he executed the will. Miss Chang was aware that the deceased had been diagnosed
- F with Parkinson disease but was not aware that he suffered from dementia. She confirmed with Dr Tok that the deceased was of sound disposing mind when he signed the will. She explained the contents of the will and he understood what he was signing. The deceased himself corrected the spelling of the names of his grandchildren who were mentioned in the will. Miss Chang got the
- G deceased to thumbprint at the amendment instead of reprinting another draft. She assisted him to place his thumbprint over both the will and the power of attorney. She noticed his hand was shaking because of Parkinson's disease and his speech was slow but she had no reason to doubt his mental capacity. The defendants also called another advocate to testify. The deceased had apparently
- H executed an earlier will in 2003. Ho Li Na was the advocate who attested that will. In that will, he bequeathed all his entire estate to the third defendant. He also signed that will by affixing his thumbprint.

THE ATTENDING DOCTOR

- I [5] The doctor who examined the deceased before he signed the will was Dr Tok. She checked the vital signs of the deceased when she arrived at the house. She had a short conversation with the deceased. She had no problem communicating with him and had no reason to suspect that he was suffering

from mental disorder. She, therefore, did not conduct a neurologic examination. She certified that he was mentally alert and sound during the signing of the will and the power of attorney.

A

THE NEUROLOGIST

B

[6] Dr Soo was the neurologist who attended to the deceased from 2003 until he died. The deceased was first referred to him in March of 2003. He found that the deceased suffered from mild dementia and vascular parkinsonism. The deceased scored 7 out of 10 when he conducted the abbreviated mental test ('AMT') which is a structured tool to test for dementia. He treated the deceased with a drug called *exelon* which improved his condition significantly. By August and October of 2003, the deceased scored 10 of 10 in the AMT which indicated that he was normal. The only time the deceased suffered hallucination or confusion was on 6 August 2004. However, that condition was due to the side effect of a drug called *madopar* which was used to improve his physical state. He prescribed another drug called *seroquel* which resolved the side effect. During subsequent follow ups in 20 August, 3 September and 28 December of 2004, he found the condition of the deceased had gradually improved. The deceased was able to converse and walk with no further episodes of hallucinations. Dr Soo did not perform AMT on the follow up visits as his condition had improved and there was no evidence to show that his cognitive ability had deteriorated.

C

D

E

FAMILY FRIEND — THE SECOND ATTESTING WITNESS

F

[7] Philip Yong is a family friend. He knew the deceased since the 1960s. He went to the same school as the second defendant but got to know him only in the 1980s. He had known the first and fourth defendants for about ten years. The second defendant requested him to witness the will in question. He noted that there was general chit chatting and exchange of greetings. The atmosphere at the signing event was 'relaxed and nice'. He did not see anyone force the deceased to place his thumbprint on the will. The deceased was in fine spirit and spoke with Colina Chang about the contents of the will. However, he agreed with the plaintiffs' counsel that the deceased was slower. Nonetheless the deceased was mentally alert and was still able to crack some jokes.

G

H

THE PLAINTIFFS — THE WEST MALAYSIAN FAMILY

[8] The plaintiffs are the sons of the deceased from his first marriage in West Malaysia. He came over to Kuching in the 1950s to work and raised another family with the third defendant. His first wife (Phyllis Chong Tat Nyong) was in West Malaysia and had passed away some time ago. Apart from the plaintiffs, the deceased also had a daughter by the name of Juliet with his first wife. She

I

- A did not join as a plaintiff in this suit. The first plaintiff is the younger son of the deceased and his first wife in West Malaysia. He qualified as an accountant from the United Kingdom. His studies were financed by the deceased. He stayed in Rock Villa on only four occasions. The first time was when he came back during university holidays for a month. The second time was when the
- B first defendant got married. The third time was when the deceased was hospitalised in 2003. The fourth time was during the funeral of the deceased. However, he referred to Rock Villa as the family home and said that the deceased had told him that all his properties would be fairly divided between the two families. He agreed that he did not visit his father after 2003. He said
- C he was close to his father and was even asked on one occasion to go through his accounts. That was when he discovered that his father had income of RM750,000pa. However, during cross-examination, he conceded that he was not sure whether it was gross income from insurance sales or net income. The second plaintiff is the elder son from his first marriage. He is a pensioner. To his
- D knowledge the deceased owned six lots of land as follows:
- (i) all that parcel of land together with the building thereon and appurtenances thereof situate at Rock Road, Kuching, containing an area of 4,047.0 square metres, more or less and described as Lot 48 Section 35 Kuching Town Land District (hereinafter referred to as the Property '1').
- E
- (ii) all that parcel of land situate at Lutong/Kuala Baram Road, Miri, containing an area of 4654 square metres, more or less and described as Lot 10 Block 5 Kuala Baram Land District (hereinafter referred to as the Property '2')
- F
- (iii) (a) all that parcel of land situate at Batu Kawa Road, Kuching containing an area of 4060 square metres, more or less and described as Lot 184 Block 223 Kuching North Land District;
- G
- (b) all that parcel of land situate at Batu Kawa Road, Kuching, containing an area of 4157 square metres, more or less and described as Lot 185 Block 223 Kuching North Land District;
- G
- (c) all that parcel of land situate at Batu Kawa Road, Kuching, containing an area of 4309 square metres, more or less and described as Lot 186 Block 223 Kuching North Land District; and
- H
- (d) all that parcel of land situate at Batu Kawa Road, Kuching, containing an area of 4456 square metres, more or less and described as Lot 187 Block 223 Kuching North Land District. (hereinafter referred to as the Property '3')
- I
- [9] According to the second plaintiff, the deceased told him before he passed away that the properties 1, 2 and 3 would be divided equally between the two families. He said he was close to his father. He rang him every Chinese New Year until he passed away. He did not learn of his father's passing away for a few months as no one told him. Like his brother he referred to Rock Villa as his family home although he agreed that he stayed there only once. After his

father's death, he heard from Romano who is his half brother that the first and second defendants had claimed that there was a will. Romano told him that he was initially told that there was no will. However, neither the plaintiffs nor the defendants called Romano to testify.

A

ISSUES

B

[10] At the outset, the parties agreed that the central issue that would determine the suit is the validity of the will and power of attorney dated 18 January 2005. As learned counsel for the plaintiffs rightly pointed out, the burden to prove testamentary capacity, ie that he was of sound disposing mind and due execution of the will is on the presenters of the will (see *Udham Singh v Indar Kaur* [1971] 2 MLJ 263 and *Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai*). I shall first consider whether the deceased was of sound disposing mind when he signed the will and the power of attorney.

C

D

TESTAMENTARY CAPACITY

Relevant time

[11] The relevant point of time to determine testamentary capacity is the time when the testator signs the will. He may have been lacking such capacity prior to the signing of the will or after signing the will but that is irrelevant for purpose of determining the validity of the will. In this case, there is evidence that the deceased fell ill in 2003 and was hospitalised. That was the time he was diagnosed with Parkinson disease and mild dementia. He was also reported by the attending neurologist to have suffered hallucination and delusion as a result of adverse reaction to medication in 2004. He recovered when another drug to counter the side effect was given. He died in July of 2006, presumably from the progression of his illness. However, the point of time that is crucial to the determination of the issue whether he possessed a sound disposing mind is 18 January 2005, ie the date the will and power of attorney were signed.

E

F

G

Criterion of sound disposing mind

[12] Both parties referred to the following famous passages from Cockburn CJ in *Banks v Goodfellow* (1870) LR 5 QB 549). This passage was cited in the local case of *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19 (Court of Appeal) and *Gan Yook Chin (p) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309 (Federal Court):

H

I

It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he

- A ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties — that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.
- B In deciding upon the capacity of the testator to make his will, it is the soundness of the mind and not the particular state of bodily health, that is to be attended to; the latter may be in a state of extreme imbecility, and yet he may possess sufficient understanding to direct how his property shall be disposed of;
- C But his memory may be very imperfect; it may be greatly impaired by age or disease; he may not be able at all times to recollect the names, the persons, or the families of those with whom he had been intimately acquainted; may at times ask idle questions, and repeat those which had before been asked and answered, and yet his understanding may be sufficiently sound for many of the ordinary transactions of life. He may not have sufficient strength of memory and vigour of intellect to make and to digest all the parts of a contract, and yet be competent to direct the distribution of his property by will. This is a subject which he may possibly have often thought of, and there is probably no person who has not arranged such a disposition in his mind before he committed it in writing.
- D
- E [13] From above passages from *Banks v Goodfellow*, which was approved by the Court of Appeal and Federal Court in *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor*, it is clear that testamentary capacity is a slighter capacity than contractual capacity. In *Tho Yow Pew & Anor v Chua Kooi Hean* [2002] 4 MLJ 97 Gopal Sri Ram JCA said as follows in respect of testamentary capacity:
- F
- G Now, the law upon the subject of a testator's testamentary capacity, we find to be well settled. The decided cases show quite clearly that very slight testamentary capacity is required for the making of a will. The cases which wills have been held invalid for lack of testamentary capacity involve testators who were utterly insane either upon the finding of the probate court or by reason of an order appointing a committee on the ground of the insanity of the testator ... What the law requires to vitiate testamentary capacity is an insane delusion existing at the time of making the will. This will include insanity at the time of the making or giving instructions for the making of the will.
- H
- I [14] There is no judicial pronouncement that only mental disorder or insanity will vitiate testamentary capacity. However, from reading of the above passages of the superior courts, it is clear that ailing memory and weak mental power cannot not vitiate testamentary capacity either. Whether the deceased possessed a sound disposing mind at the time of the execution of the will is a question of fact to be determined upon the evidence of the witnesses. The will in question was not executed in the presence of only the testator and the presenters of the will. The will in question was professionally drafted by an advocate, one Miss Colina Chang who had called a doctor to be present. Miss

Chang received a call from the second defendant who told her that his father wanted a will to be prepared. She personally called on the deceased to receive instructions. She prepared a draft will the following day and it was returned with some spelling corrections. It was a simple will that bequeathed the entire estate of the deceased to his surviving wife, the third defendant. It is not disputed that the deceased had made a previous will in 2003 that made a similar bequest. The only difference is that there were contingency provisions for the distribution of the estate in the event the third defendant predeceased the testator. In such an event, the beneficiaries would be the children and grandchildren of the deceased and the third defendant. The medical doctor that was present was Dr Tok. Her evidence is to determine the question whether the deceased possessed a sound disposing mind. Dr Tok examined the deceased's vital signs and held a brief conversation with him. Dr Tok was acquainted with the deceased because she had been making house calls to see the third defendant who is aging and unwell from fourth stage kidney failure. This is what she said:

A

B

C

D

Q: What else?

A: Had chat with him.

E

Q: Recall?

A: Vaguely, asked him whether he took medication, who gave him, whether he was brought out his house, whether family took him out socially.

Q: How was his conversation?

F

A: Reserved, shy, but he was making effort, words not clear but slurred, sometimes, facial movement, maintained eye contact throughout my examination.

Q: Did you have problem communicating?

G

A: No, although sometimes answer not coming out in words.

Q: You stated in letter that he was mentally sound, elaborate?

A: Mentally alert, aware of his surroundings.

H

Mentally sound to me is when he can comprehend what I said.

[15] Dr Tok was satisfied that the deceased was mentally alert because she managed to have a conversation with him. His voiced was slurred and he was slow to respond because of Parkinson's disease but she had no reason to conclude that he did not comprehend what she said to him. She thought it was normal procedure for a doctor to be present because the deceased suffered from Parkinson's disease. She was not told that he had been diagnosed with mild dementia as well. Dr Tok did not perform any structured Q & A mental test on

I

- A him because she had no reason to suspect that he was mentally unsound. This is what she said when challenged during cross-examination why she did not perform a mental test:
- B Q: See page 6, you said you were not suspicious that this test has to be done, in your certificate you said he is mentally sound, I put to you that without doing the test, you are in no position to say that?
- A: I disagree, my conversation with him tells a thousand words, people cannot recollect sometimes.
- C [16] During re-examination, she said that at the end of conversation with the deceased she had no doubt that he was able to make his own decision, that he was coherent, and that he was mentally sound. The neurologist (Dr Soo) who treated the deceased between 2003 and 2006 was not called to be present during the will signing ceremony but he was called to testify about the mental condition of the deceased. His evidence strongly supported the evidence of Dr Tok because on the last three occasions that he saw the deceased on 20 August, 3 September and 28 December of 2004, he did not see the need to perform any mental tests because he was able to converse with him and there was no evidence that his cognitive ability had deteriorated. Counsel for the plaintiffs submitted that Dr Soo did not perform a complete AMT during the later visits of the deceased because his cognitive ability had deteriorated. With respect, this submission is pure speculation. Dr Soo categorically said that there was no deterioration in the cognitive ability of the deceased and that he was able to communicate with him on his last visit. He said that in 80%–90% of cases, cognitive impairment can be assessed by simple communication. He also testified that he had diagnosed the deceased for mild dementia in 2003 and he was treated with a drug called *exelon*. Thereafter his score on the AMT improved and he scored 10 out of 10. Counsel for the plaintiffs referred him to the Merck Manual of Medicine that states that dementia is a progressive illness.
- D
- E
- F
- G However, Dr Soo found that up to 28 December 2004, ie the last examination before the signing of the will, the deceased was able to communicate with him and thus he had no reason to perform the AMT on him. Dr Soo said as follows:
- H Q: When he saw you on 3.9.2004 and subsequently on 28.12.2004, did you conduct any AMT test on him?
- A: I did not conduct a complete AMT test but I did talk to him and gather enough information to assess his physical and general status. As at that point in time, I did not feel a need to complete a AMT test.
- I Q: When does the situation warrant a complete AMT test in your view?
- A: AMT test is not performed routinely in every my follow up of patient. I would do it if I feel the patient is not responding well to my treatment, when I need to change a drug, when I suspect the patient is not doing well in the treatment and sometime as routine at certain interval, for instance, 6 months, yearly etc.

[17] During cross-examination, Dr Soo reiterated that an AMT is not always necessary to determine whether a patient had cognitive impairment: A

Q: At any given point in time it is very difficult to ascertain accurately if the patient have cognitive impairment and to what degree without the benefit of AMT. Do you agree? B

A: Objectively, mental state is best assessed with structured tools, example AMT. However, mental state (cognitive impairment) can often be assessed subjectively by simple communication with patient and asking patient some questions. The benefit of structured tools are (1) it can be used for comparison at different point in time, (2) it can be also used for comparison if different doctor were to assess the patient. Subjective tests that I mentioned earlier would not have such advantage. So the answer is structure tools are desired or preferable but not absolutely necessary but depends on the purpose of the assessment. C

[18] Dr Soo said that he was not able to communicate with the deceased only in November of 2005: D

Q: How did you normally communicate with him?

A: In English. I have no problem communicating with him during his consultation and his follow up with me till November 2005. Meaning that from 2003 until the last follow up that is on 28.12.2004, we could communicate. I could not communicate with him in November 2005. E

[19] Dr Soo was not present during the signing of the will. However, Dr Soo's evidence supports Dr Tok's opinion that she was able to ascertain the mental condition of the deceased without performing a structured Q & A test as the deceased was able to communicate and able to comprehend what was being said to him. Apart from referring to the Merck Manual of Medicine which was described by Dr Soo as a manual for the general practitioner, the plaintiffs did not call any neurologist to challenge Dr Soo's opinion evidence. Counsel for the plaintiffs suggested that the fact that Dr Tok was not told that the deceased suffered from dementia is significant. However, regardless of that omission, Dr Tok actually conducted a conversation with the deceased and satisfied herself that he was aware of his surroundings and was able to comprehend her questions. She even said that the deceased was passionate when the subject of the conversation turned to dancing. She thought, at that point, that if the deceased could get out of his chair to dance, he would have done so. Dr Soo gave evidence that the deceased suffered from only mild dementia and that his AMT scores were normal after treatment. The evidence of Dr Tok is also corroborated by Miss Colina Chang. She said that the deceased personally gave her instructions in respect of the disposition of his properties. He wanted to give everything to his second wife and if she predeceased him he wanted to leave his properties to his children and F
G
H
I

A grandchildren. He gave the percentage apportionments to her in respect of the bequest to the children and grandchildren of his second marriage. Miss Colina Chang said as follows:

Q: Can you tell the Court what happened?

B A: Then I start to take instruction from him. He told me that he wants to leave whatever he has when he dies to his wife. And if his wife predeceases him, he will leave some of it to his children and some to his grand children.

Q: Then can you tell the Court what else did he say concerning the will?

C A: He said to give certain percent to the children and some to his grand children, then he gave me instruction to do power of attorney.

[20] The evidence of Colina Chang if accepted as true would mean that a few days before the execution of the will, the deceased possessed sufficient control of his mental faculties to determine what percentage of his property he wanted to distribute among his children and grandchildren. On the day of the execution of the will, Miss Colina Chang read and explained the will to the deceased and he told her that he confirmed it. However, he managed to notice some spelling errors in respect of the names of his grandchildren and pointed it out to her. She corrected the names and requested the deceased to thumbprint the said amendments. Her evidence corroborates the evidence of Dr Tok that there was no reason to suspect that the deceased could not comprehend what was being said to him. Miss Colina Chong called a doctor to be present because he was old and had Parkinson's disease but he was able to communicate with her. After conversing with him and explaining the will, she did not doubt his mental capacity. Dr Tok and Miss Colina Chang were subjected to meticulous and rigorous cross-examination by counsel for the plaintiffs in respect of their role in the signing of the will by the deceased. However, both of them were consistent in their testimonies that the deceased was not forced to sign the will and that he was mentally capable when he did so. These two witnesses are professionals who have no interest in the outcome of the litigation. In fact their impartiality was not challenged. It is true that their services had been engaged by the propounders of the will. However, I have no reason to think that these two professionals would perjure themselves in court just so that the defendants could benefit from the impugned will. The second attesting witness (Philip Yong) also told the court that the deceased was mentally alert and knew what was happening. This witness, although a family friend of the defendants, is not a beneficiary of the will. He was also subjected to painstaking and lengthy cross-examination. However, he was consistent in his evidence that the deceased was mentally alert, could converse on that day but with slurred slowed speech and was able to joke. I see no reason to doubt the credibility of this witness. On the other hand, the plaintiffs have not given any evidence to suggest that the deceased was not of sound mind. The second plaintiff said that he called his father every year to wish him Happy Chinese New Year but in the

year 2005, he noticed his father was forgetful. However, he agreed that his father could still remember him. Therefore I find that the defendants have discharged the burden of proving that the deceased of sound disposing mind when he executed the will in question. I have also weighed the probabilities of the deceased not making the impugned will in question. The scale certainly tilts towards the deceased making such a will. This is because another advocate (Ho Li Na) testified virtually unchallenged that deceased had made a previous will in which he bequeathed all his properties to his surviving wife (the third defendant) as well. The argument of the plaintiffs that the deceased would have left Rock Villa to be shared between the children of both his wives seems very improbable. This is because by their own admission, the plaintiffs never lived in this house. The second plaintiff only visited Rock Villa once in his life time. The first plaintiff stayed there on his short visits only four times. Yet both these witnesses referred to this property as their 'ancestral family home'. The evidence of the third defendant has a greater ring of truth in it. She said she lived in the house with the deceased since it was constructed and raised her family there. She directed the purchase of materials for the construction of the house and she was told it was her matrimonial home. The plaintiffs also told the court they were close to the deceased. The implication is that the deceased would have left them some property to be shared with their stepbrothers and stepmother. However, from their own testimonies, it can be inferred that they were not close to the deceased. The plaintiffs only visited their father only once since he fell ill in 2003. They only called him every Chinese New Year. The second plaintiff did not even attend his father's funeral. He said he was not aware of his passing away for a few months. However, the first plaintiff who shares the same address as him managed to attend the wake for the deceased. The second plaintiff also admitted that at one point during the stock market crash of the late 90s, he had wanted to borrow money (RM8,000) from the deceased. However, the deceased refused to lend him any money. It was the fourth defendant who loaned him the money. All these facts only served to show that the plaintiffs were not as close to the deceased as they would want the court to believe. Therefore, there is nothing irrational or improbable about the impugned will that cut them out of any inheritance.

WHETHER ANY SUSPICIOUS CIRCUMSTANCES

[21] Learned counsel for the plaintiffs referred to the description of the will signing scene by the witnesses and suggested that the deceased probably thought that he was at party and did not realise that he was signing his last will and testament which dealt with all his properties. Philip Yong described the atmosphere as 'relaxed and nice' where there was 'social chit chat' and 'jokes'. Dr Tok said that:

A ... drinks served, we were talking about some social event, going for drinks, IfYY Lee could come off his chair and dance he would, we talked something that he is passionate about.

B [22] Miss Colina Chang said that the chit chat was about weather, TV programmes, the deceased's olden days dancing and drinking. In my opinion, there is nothing suspicious about the description of the will signing scene. The serving of drinks and chit chatting with invited guests is a common social etiquette practice. Dr Tok and Miss Colina Chang told the court that the deceased understood the conversation they conducted with him. Therefore, there is no reason to infer that the whole social scene with drinks and chit chatting was elaborately contrived to induce the deceased to believe that he was at a party instead of a will signing ceremony. Counsel for the plaintiffs also submitted that Miss Colina Chang had assisted the deceased to roll over his thumbprint. Again, I see nothing suspicious in this act. It is not disputed that the deceased's hands were shaky. He was 80 years old at that time and he suffered from Parkinson's disease. Dr Soo said that the deceased suffered from stiffness, slowness and some unsteadiness. It is common even for a normal person to be assisted to roll over the thumbprint in a formal document. There is no evidence at all to suggest that the thumbprint of the deceased was rolled over the will and the power of attorney by coercion or force.

F [23] Counsel for the plaintiffs also submitted that the defendants should have called Dr Soo to the will signing ceremony to certify that the deceased was of sound disposing mind instead of Dr Tok who was the physician of the deceased's second wife. I do not think that this is a suspicious circumstance.

G [24] Dr Soo was the only neurologist in Sarawak at that time. It is not in evidence why he was not called but there is no rule of law that only neurologist should be called to certify that someone is sane or of sound disposing mind. Dr Tok who is a qualified physician gave credible and convincing evidence that she had held a conversation with the deceased on general matters for about ten minutes and she was satisfied that he was of sound mind. The evidence of other disinterested witnesses such as Philip Yong and Colina Chang also established that the deceased possessed the capability to converse and was aware of what was being said to him. He even had the presence of mind to make a spelling correction on the will. Therefore the argument that there is something suspicious on the part of the defendants in not calling Dr Soo to certify the deceased as possessing a sound mind before he signed the will is without merit. In the premises, I find that there are no suspicious circumstances surrounding the making of the will.

WHETHER UNDER UNDUE INFLUENCE

[25] Counsel for the plaintiffs submitted the deceased was wheelchair bound

and depended completely upon the second defendant for his everyday needs. The argument is that he exerted undue influence on the deceased. Counsel for the plaintiffs also submitted that there was something suspicious about the power of attorney that was executed in favour of the first and second defendant. He said that the power attorney was unnecessary as there were provisions in the will for the distribution of the estate in case the third defendant died before the deceased. In my opinion, there is no evidence that the second defendant had exerted undue influence over the deceased although he lived in the same house at the material time. He gave unchallenged evidence that he was seriously ill around the same time. Miss Colina Chang personally took instructions from the deceased before she drafted the will. She did not report that the deceased was subjected to the undue influence of the second defendant when he gave the said instructions. The deceased did not live alone with the second defendant. His mother, the third defendant lived there as well. The deceased who is apparently wealthy also had two Indonesian maids to look after him and attend to his needs. The suggestion of the plaintiffs that the second defendant had unduly influenced the deceased appears speculative and without basis.

A

B

C

D

CONCLUSION

[26] The burden to prove testamentary capacity and due execution of the will is on the defendants. In my opinion that burden was discharged by the defendants. There is no evidence at all that the deceased was not of sound mind at the time or around the time of making the will in question. The defendants called the doctor and lawyer who were present during the time the will was signed to give credible evidence that the deceased was of sound mind and that he knew what he was signing. They also called the neurologist who was treating the deceased to the witness stand. Dr Soo was able to communicate with the deceased about three weeks before the date in question. The sole beneficiary of the will in question is the third defendant. The sole beneficiary of a previous will executed in 2003 also named the third defendant as the sole beneficiary. Therefore, there is no reason to treat the impugned will as irrational and suspicious. In respect of the allegation of undue influence, there is no evidence at all to support the plea. All the circumstances pertaining to the signing of the will appear to be normal. The allegation of the plaintiffs that the fact they were cut out of the will is a suspicious and irrational circumstance is without merit. Their own evidence establishes that they were not as close to the deceased as they claimed. For example, the deceased who was wealthy man had not even bothered to lend RM8,000 to the second plaintiff when he urgently required the money. I therefore rule that the will and power of attorney are valid. The suit is therefore dismissed with costs.

E

F

G

H

Suit dismissed with costs.

Reported by Kanesh Sundrum

I